WHY THE FEDERAL COMMUNICATIONS COMMISSION SHOULD NOT ADOPT A BROAD VIEW OF THE "PRIMARY VIDEO" CARRIAGE OBLIGATION: A REPLY TO THE BROADCAST ORGANIZATIONS

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I have previously prepared a constitutional analysis, submitted to the Federal Communications Commission on July 9, 2002 by the National Cable & Telecommunications Association ("NCTA"), demonstrating that both First Amendment and Fifth Amendment concerns prevent the Commission from adopting a broad view of the "primary video" carriage obligation. Forcing cable operators to carry a digital television station's multiple video streams would violate the editorial freedom of cable operators, harm cable programmers, and interfere with the rights of the audience to choose what they want to view on their cable systems. A multiple carriage requirement would not promote any of the governmental interests approved by the Supreme Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), and it would raise additional constitutional questions under the Takings Clause and the separation of powers.

Now that the Commission is preparing to address the various petitions for reconsideration of its initial determination that "primary video" means a single video

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programming stream, NCTA has asked me to reply to the constitutional arguments raised by a number of broadcast organizations in response to my analysis.[1]

SUMMARY

The broadcast organizations make four basic points in their various submissions:

First, they argue that a multicast must-carry requirement would not be burdensome for cable operators because standard-definition multicast programming would occupy no more bandwidth on a cable system than the existing 6 MHz used for analog must-carry and no more bandwidth than a single high-definition digital programming stream. They accuse me of misunderstanding the relevant technological facts and argue that this supposed error infects my First Amendment analysis.

Second, the broadcast organizations contend that the Supreme Court's decisions in *Turner I* and *Turner II* – including Justice Breyer's concurrence in *Turner II* -- justify a multicast carriage requirement and that the cable companies are just re-arguing issues they lost in *Turner I* and *Turner II*.

Third, the broadcast organizations maintain that a multicast carriage rule would not raise any Fifth Amendment or "takings" questions because it supposedly would not result in any physical occupation of cable operators' property.

[1] On August 5, 2002, the National Association of Broadcasters ("NAB") filed an ex parte response to my analysis. "A Constitutional Analysis of the 'Primary Video' Carriage Obligation: A Response to Professor Tribe," prepared by Jenner & Block, attached to August 5, 2002 letter from Jack N. Goodman to Marlene H. Dortch, CS Docket No. 98-120 (hereinafter "NAB memo"). On August 12, 2002, the Association of Public Television Stations ("APTS"), the Public Broadcasting Service ("PBS"), and the Corporation for Public Broadcasting ("CPB") (collectively, "Public Television") filed an ex parte response as well. Letter from Jonathan D. Blake, *et al.*, to Marlene H. Dortch dated Aug. 12, 2002, CS Docket No. 98-120 (hereinafter "Public Television letter"). On September 5, NAB and the various public television organizations submitted a series of additional memoranda to the Commission relating to the constitutional issues. Letter from Henry L. Baumann, *et al.,* to Hon. Michael Powell dated September 5, 2002, with attachments ("September 5 memoranda").

Fourth, they argue that the "constitutional avoidance" rule does not come into play and instead urge the Commission to adopt an expansive view of its powers under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The broadcast organizations are wrong on each of these points.

1. The constitutionality of a multicast carriage requirement is not affected by whether multicast broadcast digital programming would occupy no more bandwidth on a cable system than the existing 6 MHz used for analog must-carry. The salient point, which the broadcast organizations overlook, is that broadcasters are not entitled in perpetuity to six MHz (or even three MHz) of space on cable systems – let alone six channels. (It is undeniable, of course, that multicasting six program streams would occupy six channels on a cable system rather than one.) Any occupation of cable systems must continue to be tested under the First Amendment.

Similarly, it is irrelevant whether standard-definition multicast programming would occupy no more bandwidth than a single high-definition digital programming stream. Any grant to broadcasters of carriage rights on cable systems must be tested (at minimum) against the "narrow tailoring" requirement of intermediate First Amendment scrutiny. If carriage rights flunk this test, then they are invalid – regardless of whether they are no more burdensome, or even less burdensome, than other kinds of carriage rights. In this case, a multicasting carriage requirement is not reasonably necessary to achieve any substantial governmental interests and therefore fails the narrow tailoring standard.

Nor are the broadcast organizations' criticisms of the factual assumptions in my earlier submission accurate. My original submission expressly recognized that, with

respect to a cable system's capacity, carriage of a broadcaster's multicast digital signal might require no more bandwidth than carriage of an analog signal or a high-definition digital signal (although a multicast carriage obligation may, in fact, require more bandwith than carriage of a single high-definition signal) . That simply is beside the point.

2. The broadcast organizations are wrong in contending that a multicast carriage requirement is narrowly tailored to the purposes of the 1992 Cable Act – (a) "preserving the benefits of free, over-the-air local broadcast television" and (b) "promoting the widespread dissemination of information from a multiplicity of sources."[2] Justice Breyer's concurrence in *Turner II* makes clear that these interests were the *only* permissible bases for the must-carry rules.

The first interest embodied in the 1992 Act concerned the risk that a broadcast station would not be carried *at all* on a cable system. That risk is fully addressed by existing must-carry rules, which ensure that the single broadcast channel traditionally received by over-the-air viewers will continue to be available on cable systems.

The second interest – promoting a "multiplicity of sources" – is not served by awarding mandatory carriage rights to existing broadcasters for additional channels of programming. In fact, by burdening independent programmers, a multicast carriage rule would disserve the supposed interest in encouraging a "multiplicity of sources."

In the end, the broadcast organizations are forced to assert governmental interests that Congress did *not* establish in the 1992 Cable Act and that the Supreme Court did *not* approve in the *Turner* decisions. Their primary claims – that a multicast carriage

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[2] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

requirement will encourage broadcasters to develop additional standard definition programming and will simultaneously hasten the digital transition – are inconsistent, speculative, and utterly unsupported by any evidence. There is no evidence that multicast programming would actually be produced; that cable operators would refuse to carry it; and that as a result television stations would either deteriorate to a substantial degree or fail altogether.

Their claim that a multicast carriage rule would somehow promote the digital transition is even more far-fetched. There is no reason to think that requiring cable operators to carry broadcasters' multicast standard definition programming would somehow encourage the purchase of digital television sets or the use of digital set-top boxes by cable subscribers. In fact, by displacing cable program networks that cable operators would otherwise choose to carry, mandatory carriage of broadcasters' multicast digital channels is likely to make digital programming less, not more, attractive to cable subscribers.

3. The broadcast organizations deny that a multicast carriage requirement would present any Fifth Amendment or separation-of-powers questions. However, in *Turner I*, four Justices recognized that must-carry rules present potential takings issues. Judge Williams made the same point in the three-judge district court. Because a multicast carriage requirement would grant a broadcaster exclusive use of a portion of a cable system indefinitely -- by allowing the broadcaster to send its signal (in the form of electrons) over the cable system's lines (whether fiber optic or coaxial cable) – a multicast carriage rule would effect a permanent physical occupation of the cable system. Such a taking is subject to the per se rule applicable to physical occupations, and not to

the balancing test of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

4. The rule of constitutional avoidance is squarely apposite here. The analog must-carry rule was clearly authorized by Congress; a multicast carriage requirement does not enjoy a similar congressional imprimatur. Hence, the broadcast organizations undermine their own argument when they contend that "the Commission's task is to implement the will of Congress."[3] Congress has not mandated a multicast carriage requirement.

The Commission need not definitively resolve, at this juncture, whether a multicast carriage requirement would actually be unconstitutional. It is enough to conclude that such a mandate would create a serious constitutional question. The deference to administrative action ordinarily afforded under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is entirely inapplicable where administrative action raises serious constitutional issues. *See Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1996). The Supreme Court has explained that, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *see also INS v. St. Cyr*, 121 S. Ct. 2271, 2279 (2001) ("when a particular

[3] See Donald B. Verrilli, Jr., "Constitutional Standards Applicable to 'Primary Video' Carriage Obligations," at 2 (attachment to September 5 memoranda).

interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result"); *Jones v. United States*, 529 U.S. 848, 851 (2000) ("constitutionally doubtful constructions should be avoided where possible").

There is no clear congressional mandate for a multicast carriage requirement. The fact that NAB felt compelled to submit a memorandum of 27 pages, and Public Television 18 single-spaced pages, in addition to their September 5 joint filing of 14 additional pages – all in response to my considerably shorter submission -- demonstrates, by itself, the serious constitutional doubt that would plague any multicast carriage requirement.

I. A Broad Interpretation of "Primary Video" Would Raise Serious First Amendment Questions.

A. A Multicast Carriage Requirement Would Impose a Substantial First Amendment Burden.

A principal argument of the broadcast organizations is that, because a multicast carriage requirement (they aver) would entail no greater occupation of a cable operator's capacity, it would impose no greater burden on cable operators than the analog must-carry rules by the Supreme Court in *Turner I* and *Turner II* . The broadcast organizations accuse me of overlooking the salient technological facts in my constitutional analysis.

The short answer is that the broadcast organizations are completely mistaken both as to my prior submission and to its constitutional consequences. As I expressly noted on p. 6 of my July 9, 2002 submission to the Commission: "[o]thers have argued for an expansive interpretation of 'primary video' on the ground that broadcasters already occupy 6 MHz of frequency on cable systems as a result of the analog must-carry rules.

But this state of affairs is constitutionally irrelevant." "The return (as part of the digital transition) of the 6 MHz currently occupied by analog must-carry signals does not entitle broadcasters to a *new* 6 MHz of must-carry spectrum for multicasting purposes." (pp. 6-7) "In upholding the analog must-carry rules in *Turner I* and *Turner II*, the Supreme Court did not grant broadcasters a permanent easement or other property right of 6 MHz of space on cable systems. In fact, the Court made clear that the must-carry rules were a burden on speech and expressly rejected the Government's argument that the must-carry rules were subject to no heightened First Amendment scrutiny." (p. 7).

The broadcast organizations have failed to come to grips with this analysis. The analog must-carry rules were adopted to address a specific governmental interest – the preservation of over-the-air broadcast television -- by ensuring that the single analog signal is available to cable viewers. In upholding the rules in *Turner I* and *Turner II*, the Supreme Court held that the analog must-carry rules interfered with cable operators' editorial discretion and triggered heightened First Amendment scrutiny. Indeed, the Court subsequently opined that the must-carry rules "implicated the heart of the First Amendment, namely, the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (internal quotation marks omitted). Nonetheless, the Court concluded in *Turner I* and *Turner II* that, in light of the specific findings by Congress in the text of the 1992 Cable Act and the extensive empirical evidence submitted to the Court, the rules were narrowly tailored to the governmental interest.

The situation with respect to a multicast carriage requirement is entirely different. The broadcast organizations cannot identify anything relating to multicast carriage in the

1992 Cable Act, its legislative history, or the record before the Supreme Court in *Turner I* and *Turner II*. Yet the broadcast organizations seek to dismiss the First Amendment issue summarily on the specious ground that, so long as the *burden* on cable *capacity* imposed by a multicast carriage requirement is no greater than in the analog context (and may even be less, if modulation allows the signals to be carried on 3 MHz), then the *narrow tailoring* requirement can simply be ignored. That is obviously fallacious. It overlooks the fact that multicasting six programming streams would occupy six channels on a cable system rather than one (even if the signal could fit within 3 MHz). It is also directly contrary to the Supreme Court's recognition in *Turner I* and *Turner II* that the analog must-carry rules triggered heightened First Amendment scrutiny and survived such review only because they satisfied the narrow tailoring requirement. They were not sustained because "only" 6 MHz was involved. The ability of the analog must-carry rules to meet the narrow tailoring standard says nothing about whether a multicast carriage requirement would do so.

A simple hypothetical illustrates the point. Suppose, for example, that broadcasters sought to trade the 6 MHz of analog must-carry spectrum not for multicast broadcasting but for high-speed Internet services delivered by television stations. Could broadcasters argue that the First Amendment was not implicated at all, so long as their demands did not exceed the 6 MHz involved in *Turner I* and *Turner II*? Plainly not. Indeed, nothing in the 1992 Cable Act or *Turner I* and *Turner II* would provide any support for mandatory carriage of such Internet services. The salient point, which the broadcast organizations ignore, is that any multicasting must-carry regime cannot satisfy intermediate First Amendment review if broadcasters are afforded more rights on cable

systems than are necessary in order to achieve the congressional aims of the 1992 Cable Act.

NAB insists that "[f]ew predictions in this industry are as safe as the prediction that cable capacity will continue to expand, and that the relative burden of mandatory carriage of the entire digital broadcast signal will continue to rapidly decrease." NAB memo at 7. But NAB ignores the fact that broadcasters are not the only potential users of the available capacity on cable systems. Cable operators already plan to use existing and future capacity to provide new program channels, pay per view, video on demand, subscription video on demand, digital audio, Internet access, telephony, and other services.

Moreover, the burden on nonbroadcast cable programmers, present in a single-signal must-carry regime, would be enlarged by a multicast carriage requirement. For decades, the number of would-be nonbroadcast programmers has exceeded the available channel capacity of cable. These programmers do not have an over-the-air method of reaching DTV households as broadcasters do under the mandatory tuner requirement, and would be foreclosed from cable carriage by a multicast carriage requirement. Every bit of cable plant not used for a governmental requirement can be used by cable operators to offer new choices of video programming, as well as new choices of other services.

The *Turner* decisions recognize the burden on the First Amendment rights of nonbroadcast cable programmers but nevertheless sustained the rules because of other congressionally identified interests. Here, no such interests exist. But the First Amendment rights of cable programmers persist in the constitutional analysis.

B. A Multicast Carriage Rule Would Not Satisfy the "Narrow Tailoring" Requirement of Intermediate Scrutiny.

Existing must-carry rules will ensure that, during and after the digital transition, cable operators will continue to carry the same broadcast channels that have traditionally been available to over-the-air viewers. Thus, existing must-carry rules will ensure that the governmental interests identified in *Turner I* and *Turner II* are fully met. These interests are limited to: (a) "preserving the benefits of free, over-the-air local broadcast television" and (b) "promoting the widespread dissemination of information from a multiplicity of sources."[4]

These interests were the *only* permissible bases for the must-carry rules. In fact, a majority of the Court in *Turner II* expressly *rejected* the argument that the potential of anticompetitive acts by cable operators could by itself justify must-carry rules. In *Turner II*, the four dissenters (Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg) expressly found that there was not an adequate showing that "the threat of anticompetitive behavior by cable operators supplies a content-neutral basis for sustaining the statute." 520 U.S. at 235.

Justice Breyer, concurring in part, based his vote (the decisive fifth vote in *Turner II*) solely on the asserted governmental interest in protecting broadcast television. 520 U.S. at 226. He expressly did *not* join the majority opinion or analysis to the extent it relied "on an anticompetitive rationale." *Id.* NAB admits that Justice Breyer "did not reach" the competitive rationale on which its analysis rests. NAB memo at 12 n.9. That is an understatement. Justice Breyer pointedly stated: "I join the opinion of the Court

[4] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

except insofar as Part II-A-1 relies on an anticompetitive rationale." 520 U.S. at 225 (concurring in part).

Thus, Justice Breyer's concurrence in *Turner II* – coupled with the votes of the four dissenters -- makes clear that vague allusions to potential anticompetitive harm are insufficient. Undaunted, the broadcast organizations propose new justifications for a multicast carriage requirement never considered by Congress or identified by the Supreme Court in *Turner I* and *Turner II*.

First, the broadcast organizations contend that, without a multicast carriage requirement, broadcasters will have a "disincentive" "to invest the huge sums needed to develop multiple streams of locally-oriented programming or innovative video services." NAB memo at 9. Yet if broadcasters do not develop such streams, NAB asserts, they "will face a substantial disadvantage in competition for critical advertising revenue." NAB memo at 10.

Second, the broadcast organizations argue that a multicast carriage requirement can be justified by reference to "the government's important interest in ensuring a rapid transition to digital." NAB memo at 12.

These newly minted justifications are triply flawed.

(1) Nothing about the new justifications can be located anywhere in the 1992 Cable Act, in its legislative history, or in the materials before the Supreme Court in *Turner I* and *Turner II.* The 1992 Cable Act does not contain any congressional findings with respect to digital must-carry, let alone multicast digital carriage. Public Television cites to various findings in the 1992 Act (Public Television letter at 10-11) but ultimately acknowledges that these findings pertain to analog must-carry, not a multicast carriage

requirement. NAB implicitly concedes the point by arguing that the Communications Act contains a "broad statutory grant" to the Commission (NAB memo at 13) and that the Commission has the administrative power to describe new "important governmental interests that its actions are intended to advance." *Id.* at 14. The broadcast organizations take the view that it would be proper for the Commission to adopt a multicast carriage requirement to promote a digital transition even if it cannot identify in the 1992 Act's legislative history, or in the record before the Supreme Court in *Turner I* and *Turner II*, any evidence that would justify such a carriage rule.

The broadcast organizations have focused on the wrong issue. The question is not simply the *administrative law* issue of whether the Commission has the statutory authority under the Communications Act to promulgate a carriage rule for multiple streams of video programming. Rather, the question is whether, as a *constitutional* matter, a multicast carriage requirement can be squared with the First Amendment. As I discussed in my July 9, 2002 submission (at p. 10), a multicast carriage requirement cannot draw any support from the 1992 Cable Act or from the reasoning of *Turner I* and *Turner II* because such a rule would rely on new rationales never approved by Congress or the Supreme Court. Without any support from the 1992 Act, a multicast carriage rule would lack a clear congressional mandate and would face insurmountable constitutional hurdles. As the Commission is aware, prior to the enactment of the 1992 Cable Act, the Commission's attempts to justify must-carry rules were repeatedly invalidated by the courts.[5]

[5] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

The broadcast organizations point to Section 614(b)(4)(B) of the 1992 Act, which refers to "advanced television." But this reference hardly establishes that Congress made any sort of finding with respect to the two new interests that the broadcast organizations seek to advance. Section 614(b)(4) is entitled "Signal Quality," and it specifically *limits* carriage obligations to those broadcast signals "which have been changed" to conform to a new broadcast standard. Section 614(b)(4)(B) means that a broadcaster's digital signal is entitled to carriage when and only when it no longer transmits its analog signal. It says nothing about a multicast carriage requirement.

Moreover, a passing reference to "advanced television" in Section 614(b)(4)(B) says nothing about whether there is sufficient evidence to enable a multicast carriage rule to satisfy the narrow tailoring requirement. In *Turner I*, a plurality of the Supreme Court explained that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," 512 U.S. at 632, 646, in a First Amendment case a reviewing court is obligated to exercise "independent judgment" to ensure that the government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. The cable must-carry rules were adopted by Congress along with extensive factual findings made in the text of the statute itself. In addition, the Supreme Court noted that the factual development on remand had yielded "a record of tens of thousands of pages" of evidence. *Turner II*, 520 U.S. at 187 (internal quotation omitted). The Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat [to over-the-air television] justified enactment of the must-carry provisions." *Id.* at 196. The Court pointed to "specific support" for Congress' conclusion (*id.* at 197):

"substantive evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 202-03); and "[e]mpirical research in the record before Congress" (*id.* at 208). A passing statutory reference to "advanced television" is not remotely comparable to the body of evidence regarding the analog rules.

(2) The broadcast organizations' justifications are not only unsupported by anything in *Turner I* and *Turner II*; the justifications are also squarely foreclosed by the Supreme Court's decisions in those cases. It is not sufficient to assert (as NAB does) that, in the absence of a multicast carriage requirement, cable operators would have "the power to refuse carriage of multiple streams of broadcast material." NAB memo at 9. Nor is it enough to posit that a multicast carriage requirement will enable public television stations to broadcast not only a single high-definition channel during prime time but also multiple channels during the day, regardless of whether there is any viewer demand for them. Public Television letter at 5.

In *Turner I* and *II*, the Supreme Court indicated that such justifications for must-carry were inadequate. The Court rejected the argument that must-carry could be sustained merely by hypothesizing that cable operators would have a theoretical incentive not to carry broadcasters' programming or by showing that must-carry would tautologically enable broadcasters to transit their programming over cable systems. If such analyses were adequate, the Court would not have issued a remand in *Turner I*. Instead, the Court opined that "we must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry." *Turner I*, 512 U.S. at 664-65 (plurality

opinion). The Court required the government to show that "broadcast stations 'will either deteriorate to a substantial degree or fail altogether.'" *Turner II*, 520 U.S. at 191-92 (quoting *Turner I*, 512 U.S. at 666).

(3) The newly minted justifications for multicast must-carry fail the narrow tailoring requirement because they rest on naked and highly implausible speculation without a shred of supporting evidence. The broadcast organizations offer no proof that multicast programming would actually be produced; that cable operators would refuse to carry it; and that as a result television stations would either deteriorate to a substantial degree or fail altogether.

Moreover, the new justifications are contradictory. The ability of broadcasters to multicast six channels of standard definition programming under a multiple carriage requirement would in no way provide an incentive for the public to purchase high-definition television sets. In particular, there is no reason to think that requiring cable operators to carry broadcasters' multicast standard definition programming would somehow encourage the purchase of digital television sets or the use of digital set-top boxes by cable subscribers. In fact, by displacing cable program networks that cable operators would otherwise choose to carry, mandatory carriage of broadcasters' multicast digital channels is likely to make digital programming less, not more, attractive to cable subscribers.

It would be illogical to grant broadcasters an unfair advantage over cable programmers – in the form of guaranteed carriage – when cable programmers are the principal sources of the innovative programming that the broadcast organizations contend will speed the transition. HBO, Showtime, Madison Square Garden Network, Discovery,

Bravo, ESPN, Cinemax, and Comcast SportsNet are all producing high-definition programming.[6] It is double-speak for broadcasters to seek preferential access available to no other programmer on the ground that "effective competition" requires it. NAB memo at 12. The broadcast organizations seek special privileges, not a level playing field.

Further, the broadcast organizations ignore much more direct ways of spurring the high-definition digital transition, which they themselves actively advocate, such as the Commission's phase-in plan for digital television tuners and equipment. *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report & Order and Second Memorandum Opinion & Order, 17 FCC Rcd 15978 (2002), *aff'd sub nom. Consumer Electronics Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003). And cable's voluntary commitment to carry HDTV signals during the transition will have a much more direct effect than would a multicast carriage rule.

The broadcast organizations contend that none of this matters because the "least restrictive alternative" test is not applicable to content-neutral restrictions on speech under intermediate First Amendment scrutiny.[7] The broadcast organizations are wrong. To be sure, intermediate scrutiny does not contain a "least restrictive alternative" requirement. But it is axiomatic that, even under intermediate scrutiny, "a governmental body seeking to sustain a restriction [even] on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied

[6] See NCTA Website, www.ncta.com.
[7] See Donald B. Verrilli, Jr., "Constitutional Standards Applicable to 'Primary Video' Carriage Obligations," at 3 (attachment to September 5 memoranda).

by mere speculation and conjecture," *id.* at 770, or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).[8]

Moreover, the obvious availability of less speech-intrusive alternatives that would directly address the government's interest can demonstrate that a regulation fails intermediate First Amendment scrutiny.[9] In the end, the analysis of the broadcast organizations is nothing but rhetoric and speculation, and it ignores the availability of obvious alternatives like the phase-in plan for digital television tuners and equipment that would directly advance the interest in promoting the transition to high-definition television.

II. A Multicast Carriage Rule Would Raise Serious Fifth Amendment and Separation-of-Power Questions.

A requirement that cable operators carry multiple programming streams, pursuant to an expansive view of "primary video," would also raise serious questions under the Takings Clause of the Fifth Amendment. A multicast carriage requirement would grant a broadcaster exclusive use of a portion of a cable system indefinitely and would effect a permanent physical occupation of that property, by allowing the broadcaster to send its signal (in the form of electrons) over the cable system's lines. Unlike the analog must-

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[8] *See also Thompson v. W. States Med. Ctr*., 122 S. Ct. 1497 (2002); *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2425 (2001); *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1764 n.8 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *Ibanez v. Florida Dept. of Business & Prof'l Reg.*, 512 U.S. 136, 143 (1994).

[9] *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2426 (2001) (noting that the state did not consider less burdensome alternatives, such as tailoring the restrictions to "advertising and promotion practices that appeal to youth, . . . while permitting others"); *id.* at 2438 (Thomas, J., concurring in part and concurring in the judgment) (the regulations "fail the narrow tailoring inquiry" because "the State should have examined ways of advancing its interest that do not require limiting speech at all"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (ban not tailored because of "alternative forms of regulation that would not involve any restriction on speech"); *id.* at 528-29 (O'Connor, J., concurring) (noting "availability of less burdensome alternatives"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993) (considering less burdensome alternatives); *see also U S WEST, Inc. v. FCC*, 182 F.3d 1224, 1238-39 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000) ("the FCC's failure to adequately

carry rules approved in *Turner*, a multicast carriage requirement would *not* enjoy clear congressional authorization and therefore raises significant separation-of-powers issues as well as takings concerns.

In *Turner I*, four Justices recognized that a common carriage obligation for "some" of a cable system's channels would raise constitutional questions under the Takings Clause. *See Turner I*, 512 U.S. at 684 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part).[10]

Judge Williams similarly raised a serious takings question in the 3-judge district court:

> Because of my conclusion on the First Amendment challenge to the must-carry provisions, I do not reach the contention that those provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment. I do not, however, regard the claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, gratis, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp*., where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television. The NAB responds that *Loretto* is limited to physical occupation of real property. . . . But the insertion of local stations' programs into a cable operator's line-up presumably is not a metaphysical act, and presumably takes place on real property.

Turner Broadcasting System, Inc. v. FCC, 819 F.Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting).[11]

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consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor the . . . regulations" restricting speech).

[10] The broadcasters' attempt to brush off the opinion's allusion to "possible Takings Clause issues," 512 U.S. at 684 (O'Connor, J., concurring in part and dissenting in part), as an "off-hand reference" (NAB memo at 22) made "in passing." Public Television letter at 3. But the Commission would ignore this deliberate reference at its peril. Four Justices joined in Justice O'Connor's opinion, even though the takings issue was not squarely before the Court.

[11] Former Commissioner Furchtgott-Roth also opined that "[i]t is not unreasonable to argue that when a broadcast station's signal is mandatorily carried over a cable system, that carriage constitutes a permanent, physical occupation of the cable operator's private property - and thus a per se taking of that property. . . . There can be no question but that Cablevision's physical plant - e.g., the actual transmission cables, whether fiber optic or metal, that form its delivery 'pipe,' as well as the headend equipment that routes the broadcaster's signal - are Cablevision's sole and private property. Moreover, the must-carry scheme does

The principal argument of the broadcast organizations is that a multicast carriage requirement would not amount to a permanent physical occupation of cable operators' property, but only to a regulation of the use of that property. Accordingly, they invoke the balancing test of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Even under that test, a multicast carriage rule would interfere with cable operators' reasonable investment-backed expectations and raise serious takings issues. However, the taking in this context qualifies as a permanent physical occupation of cable operators' property and accordingly must be judged by the per se rule that applies to such takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

Under a multicast carriage requirement, a cable operator would be deprived of its right to exclude – "one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435; *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). Broadcasters, and not the cable operator, would be granted exclusive use of certain channels on the system. The cable operator would be deprived of the use of its property in favor of broadcasters -- the electronic equivalent of a physical occupation of part of the cable system. NAB acknowledges that a physical occupation occurs where "a stranger invades and occupies the owner's property" (NAB memo at 19) (internal quotation and emphasis omitted); where a law "give[s] dominion" "over the real property (cable lines) to the government or to third parties" (*id.*); where a law "seiz[es] control of the operators' lines" (*id.*). Public Television concedes that a per se taking occurs where broadcasters

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not just fail to provide compensation for this occupation, but affirmatively prohibits it." *In the Matter of WXTV License Partnership, G.P.*, 15 FCC Rcd 3308, 3320 (2000) (concurring statement).

"otherwise physically occupy private property." Public Television letter at 15. All of these describe a multicast carriage rule.

Consider, for example, what would happen if must-carry were extended to every channel on a cable system. NAB all but concedes that a physical occupation would exist in such circumstances, where the government commandeers the entire physical plant of a business. NAB memo at 20, 23. But the same constitutional principles apply, whether the taking is effected all at once or channel by channel. NAB itself acknowledges that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982)). "[T]he requirement is unconstitutional regardless of whether the cable companies must accommodate one, five, or one hundred channels." NAB memo at 17.

To say that the invasion is electronic rather than physical cannot excuse it. Even the "seizure" of the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630-31 (1952), did not involve physical invasion or possession as such of the mills by government agents. Rather, the presidents of the various mills were deputized as "operations managers" and directed to carry on their activities in accordance with regulations and directions of the Secretary of Commerce. 343 U.S. at 583. Hence, NAB's assertion that there can be no taking without an "unambiguous takeover of the plant by the government" (NAB memo at 23) is simply wrong.

The broadcast organizations rely on the Supreme Court's recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), but that case confirms my analysis. There, the Supreme Court explained

that a genuine regulatory taking "does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.* at 1480 n.19. In this case, multicast must-carry qualifies as a physical occupation rather than as a regulatory taking, because it gives a third party the right to use the cable system and deprives cable operators of their right to exclude. "Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share no matter how small." *Id.* at 1479. "[E]ven a regulation that constitutes only a minor infringement on property may, from the landowner's perspective, be the functional equivalent of an appropriation." *Id.* at 1480 n.19.

NAB contends that Congress has already considered and rejected a takings challenge to a mandatory carriage requirement. NAB memo at 18 (citing H.R. Rep. No. 102-628 at 67 (1992)). However, the cited House Report from the 1992 Cable Act cited by NAB is limited to the context of the *analog* must-carry requirement.[12] That is just my point: there is no clear congressional authorization for a multicast carriage rule. The House Report applied the test of *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104 (1978), without analyzing whether a multicast carriage requirement – unknown to the 1992 Congress -- would result in a physical occupation of cable operators' property. In any event, the views expressed in a House report on a constitutional issue would hardly be binding on a reviewing court.

[12] *See* H.R. Rep. No. 102-628 at 67 ("since signal carriage rules were central to regulation of cable television for many years, and most cable systems have continued to carry a number of local over-the-air signals, imposition of the signal carriage regulations would not disturb any reasonable expectations of investors in cable systems").

NAB contends that the Tucker Act is available to provide compensation. NAB memo at 18 n.11. But it is precisely the possibility that the federal Treasury might be exposed to multi-billion-dollar takings claims as a result of a congressionally unauthorized multicast carriage requirement that gives rise to separation-of-powers concerns. An agency must not commit the federal Treasury to potentially massive financial exposure in the absence of a clear legislative mandate. *See Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("Of course the Clause prohibits only uncompensated takings; so long as the Tucker Act provides a subsequent action for redress, generally no constitutional question arises and the judicial policy of avoiding such questions may not be applied. But precedent instructs that the policy of avoidance should nonetheless take effect when there is an identifiable class of cases in which application of a statute will necessarily constitute a taking.") (internal quotation omitted). The potential for invocation of the Tucker Act thus aggravates the separation-of-powers violation.[13]

Finally, NAB points to other requirements, such as analog must-carry, leased access, and the interconnection, unbundling, and resale obligations imposed on LECs by the Telecommunications Act of 1996. NAB memo at 17, 21 n.13. These rules have been expressly authorized by Congress, unlike multicast carriage. Moreover, it is notable that, among these examples, only must-carry provides no compensation. Leased access allows a cable operator to receive payments. Interconnection, unbundling, and resale are

[13] NAB asserts that in the *Bell Atlantic* case, the D.C. Circuit "declin[ed] to apply physical occupation doctrine to the Commission's virtual co-location rules." NAB memo at 23. However, in virtual co-location, a competitive access provider was not granted exclusive use of a portion of the LEC's network, in the same way that must-carry afforded a broadcaster exclusive use of certain channels on a cable system. In any event, the D.C. Circuit *vacated* the virtual co-location rules as a matter of severability, without endorsing their lawfulness. *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994).

governed by the TELRIC rate-making method. *See Verizon v. FCC*, 122 S. Ct. 1646 (2002). Yet Section 614(b)(10) flatly *prohibits* cable operators from receiving compensation from broadcasters for must-carry. *See* 47 U.S.C. §534(b)(10).[14]

A multicast carriage requirement would amount to a physical occupation of a portion of cable operators' property and would raise serious Takings Clause and separation-of-powers concerns. Accordingly, the Commission should apply the rule of constitutional avoidance and refrain from imposing a multicast carriage requirement.

[14] Any suggestion that cable operators will receive "compensation" from customers in the form of subscription fees would be unavailing. Broadcasters, not customers, are the source of the taking. Customers pay for cable service, not to compensate cable operators for the taking of their property.